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CASE CLIPS

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CIVIL LAW ISSUE

RAY-HAYES v. HEINAMANN, No. 89S05-0201-CV-306, ___ N.E.2d ___ (Ind. Jan. 2, 2002).
Per Curiam

We grant transfer to resolve a conflict between the Court of Appeals' opinion in this case, *Ray-Hayes v. Heinamann*, 743 N.E.2d 777 (Ind. Ct. App. 2001), and another opinion, *Fort Wayne International Airport v. Wilburn*, 723 N.E.2d 967 (Ind. Ct. App. 2000), *trans. denied*. These two opinions disagree over whether a civil action is timely commenced if the plaintiff files a complaint within the applicable statute of limitations but does not tender the summons to the clerk within that statutory period. We hold that in such circumstances the action is not timely.

In *Wilburn*, the plaintiff tendered a complaint and the filing fee to the clerk within the applicable statute of limitations but did not tender the summons to the clerk until a few days after the statutory period expired. 723 N.E.2d at 968. The Court of Appeals held that the lawsuit was not timely commenced. *Id*. at 968-69. In so holding, the court relied on language in *Boostrom v. Bach*, 622 N.E.2d 175 (Ind. 1993), *cert. denied*, 513 U.S. 928 (1994). [Citation omitted.]

We held in *Boostrom* that a statute of limitations continued to run, and was not tolled, where a plaintiff sent her small claims complaint to the clerk within the statute of limitations but the clerk refused to file it because it was not accompanied by the prescribed filing fee. [Citation omitted.] . . . We . . . referred to the summons as one of the essential documents:

> The plaintiff, of course, controls the presentation of all the documents necessary to commencement of a suit: the complaint, the summons, and the fee. Boostrom used a standard pre-printed small claims form, which contains the complaint and the summons on a single page. She thus filed two of the three items necessary to commencement of her action. [Citation omitted.] . . .

The Court of Appeals reached the opposite conclusion in the present case, *Ray-Hayes*. Here, the plaintiff amended her original complaint to add product liability claims against new defendants Nissan Motor Company, Ltd., Nissan North America, Inc., and Nissan Motor Corporation In U.S.A. (collectively "Nissan"). The plaintiff filed her amended complaint within two years after her product liability claims accrued, but she did not tender summonses for Nissan until over four months later, beyond the two-year statutory period. [Citation omitted.] . . .

The Court of Appeals . . . held that because the plaintiff filed her amended complaint within the statute of limitations, she commenced her claims against Nissan timely and dismissal was error. [Citation omitted.] The court called *Boostrom* distinguishable as a small claims case that should be limited to its facts, and the court implied that *Wilburn* had been incorrect for relying on *Boostrom*. [Citation omitted.] Judge Sullivan dissented. . . .

We conclude that *Wilburn* was right and that Judge Sullivan's dissent in *Ray-Hayes* is correct. . . .

Moreover, our approval of *Wilburn* coincides with recent amendments to the Indiana Trial Rules reinforcing what we said in *Boostrom*. Pursuant to an amendment December 21, 2001, and effective April 1, 2002, Indiana Trial Rule 3 will read, "A civil action is commenced by filing with the court a complaint or such equivalent pleading or document as may be specified by statute, by payment of the prescribed filing fee or filing an order waiving the filing fee, and, where service of process is required, by furnishing to the clerk as many copies of the complaint and summons as are necessary." Also, Indiana Trial Rule 4(B) was modestly amended on December 21, 2001, effective April 1, 2002, to read, in part, "Contemporaneously with the filing of the complaint or equivalent pleading, the person seeking service or his attorney shall furnish to the clerk as many copies of the complaint and summons as are necessary."

. . . .

SHEPARD, C. J., and BOEHM and SULLIVAN, JJ., concurred.

RUCKER, J., filed a separate written opinion in which he dissented, and in which DICKSON, J., concurred, in part, as follows:

Although it is true that we recently amended Indiana Trial Rule 3 such that a claim filed after the effective date will require the contemporaneous tender of a summons, complaint, and filing fee, that was not the case at the time Ray-Hayes commenced this action. . . .

. . . .

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CASE CLIPS TRANSFER TABLE

January 4, 2002

This table lists recent grants of transfer by the Indiana Supreme Court for published decisions of the Court of Appeals. It includes Judicial Center summaries of the opinions of the Court of Appeals vacated by the transfers and of the Supreme Court's opinions on transfer.

A CASE CLIPS transfer information feature was suggested by the Justices of the Indiana Supreme Court in response to trial court requests for more accessible information about grants of transfer. The table is prepared with assistance from the Supreme Court Administrator's Office, which sends the Judicial Center a weekly list of transfer grants.

A grant of transfer vacates the opinion of the Court of Appeals: "[i]f transfer be granted, the judgment and opinion or memorandum decision of the Court of Appeals shall thereupon be vacated and held for naught, except as to any portion thereof which is expressly adopted and incorporated by reference by the Supreme Court, and further, except where summarily affirmed by the Supreme Court." Indiana Appellate Rule 11(B)(3).

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
South Gibson School Board v. Sollman	728 N.E.2d 909 26A01-9906-CV-222	Denying student credit for all course-work he performed in the semester in which he was expelled was arbitrary and capricious; summer school is not included within the period of expulsion which may be imposed for conduct occurring in the first semester	9-14-00	
Shambaugh and Koorsen v. Carlisle	730 N.E.2d 796 02A03-9908-CV-325	Elevator passenger who was injured when elevator stopped and reversed directions after receiving false fire alarm signal brought negligence action against contractors that installed electrical wiring and fire alarm system in building. Held: contractors did not have control of elevator at time of accident and thus could not be held liable under doctrine of res ipsa loquitur.	10-24-00	
S.T. v. State	733 N.E.2d 937 20A03-9912-JV-480	No ineffective assistance when (1) defense counsel failed to move to exclude two police witnesses due to state's failure to file witness list in compliance with local rule and (2) failed to show cause for defense failure to file its witness list under local rule with result that both defense witnesses were excluded on state's motion	10-24-00	
Tincher v. Davidson	731 N.E.2d 485 49A05-9912-CV-534	Affirms mistrial based on jury's failures to make comparative fault damage calculations correctly	11-22-00	
New Castle Lodge v. St. Board of Tx. Comm.	733 N.E.2d 36 49T10-9701-TA-113	Fraternal organization which owned lodge building was entitled to partial property tax exemption	11-22-00	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Reeder v. Harper	732 N.E.2d 1246 49A05-9909-CV-416	When filed, expert's affidavit sufficed to avoid summary judgment but affiant's death after the filing made his affidavit inadmissible and hence summary judgment properly granted.	1-11-01	
Holley v. Childress	730 N.E.2d 743 67A05-9905-JV-321	Facts did not suffice to overcome presumption non-custodial parent was fit so that temporary guardianship for deceased custodial parent's new spouse was error.	1-11-01	
Davidson v. State	735 N.E.2d 325 22A01-0004-PC-116	Ineffective assistance for counsel not to have demanded mandatory severance of charges of "same or similar character" when failure to do so resulted in court's having discretion to order consecutive sentences.	1-17-01	
Mercantile Nat'l Bank v. First Builders	732 N.E.2d 1287 45A03-9904-CV-132	materialman's notice to owner of intent to hold personally liable for material furnished contractor, IC 32-8-3-9, sufficed even though it was filed after summary judgment had been requested but not yet entered on initial complaint for mechanic's lien foreclosure	2-9-01	
State Farm Fire & Casualty v. T.B.	728 N.E.2d 919 53A01-9908-CV-266	(1) insurer acted at its own peril in electing not to defend under reservation of rights or seek declaratory judgment that it had no duty to defend; (2) insurer was collaterally estopped from asserting defense of childcare exclusion that was addressed in consent judgment; (3) exception to child care exclusion applied in any event; and (4) insurer's liability was limited to $300,000 plus post-judgment interest on entire amount of judgment until payment of its limits.	2-9-01	
Merritt v. Evansville Vanderburgh School Corp	735 N.E.2d 269 82A01-912-CV-421	error to refuse to excuse for cause two venire persons employed by defendant even though they asserted they could nonetheless be impartial and attentive	2-9-01	
State v. Gerschoffer	738 N.E.2d 713 72A05-0003-CR0116	Sobriety checkpoint searches are prohibited by Indiana Constitution.	2-14-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Healthscript, Inc. v. State	724 N.E.2d 265, *rhrg.* 740 N.E.2d 562 49A05-9908-CR-370	Medicare fraud crimes do not include violations of state administrative regulations.	2-14-01	
Vadas v. Vadas	728 N.E.2d 250 45A04-9901-CV-18	Husband's father, whom wife sought to join, was never served (wife gave husband's attorney motion to join father) but is held to have submitted to divorce court's jurisdiction by appearing as witness; since father was joined, does not reach dispute in cases whether property titled to third parties not joined may be in the marital estate.	3-1-01	
N.D.F. v. State	735 N.E.2d 321 No. 49A02-0003-JV-164	Juvenile determinate sentencing statute was intended to incorporate adult habitual criminal offender sequential requirements for the two "prior unrelated delinquency adjudications"; thus finding of two prior adjudications, without finding or evidence of habitual offender-type sequence, was error	3-2-01	
Robertson v. State	740 N.E.2d 574 49A02-0006-CR-383	Hallway outside defendant's apartment was part of his "dwelling" for purposes of handgun license statute.	3-9-01	
Bradley v. City of New Castle	730 N.E.2d 771 33A01-9807-CV-281	Extent of changes to plan made in proceeding for remonstrance to annexation violated annexation fiscal plan requirement.	4-6-01	
King v. Northeast Security	732 N.E.2d 824 49A02-9907-CV-498	School had common law duty to protect student from criminal violence in its parking lot; security company with parking lot contract not liable to student under third party beneficiary rationale.	4-6-01	
State v. Hammond	737 N.E.2d 425 41A04-0003-PC-126	Amendment of driving while suspended statute to require "validly" suspended license is properly applied to offense committed prior to amendment, which made "ameliorative" change to substantive crime intended to avoid supreme court's construction of statute as in effect of time of offense.	4-6-01	
Buchanan v. State	742 N.E.2d 1018 18A04-0004-CR-167	Admission of pornographic material picturing children taken from child-molesting defendant's home was error under Ev. Rule 404(b).	5-10-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
McCary v. State	739 N.E.2d 193 49A02-0004-PC-226	Failure to interview policeman/probable-cause-affiant, when interview would have produced exculpatory evidence, was ineffective assistance of trial. Counsel on direct appeal was ineffective for noting issue but failing to make record of it via p.c. proceeding while raising ineffective assistance in other respects. Post-conviction court erred in holding res judicata applied under *Woods v. State* holding handed down after direct appeal..	5-10-01	
Martin v. State	744 N.E.2d 574 No 45A05-0009-PC-379	Finds ineffective assistance of appellate counsel for waiving issue of supplemental instruction given during deliberations on accomplice liability.	6-14-01	
Catt v. Board of Comm'rs of Knox County	736 N.E.2d 341 (Ind. Ct. App. 2000) No. 42A01-9911-CV-396	County had duty of reasonable care to public to keep road in safe condition, and County's knowledge of repeated washs-outs of culvert and its continued failure to repair meant that wash-out due to rain was not a "temporary condition" giving County immunity.	6-14-01	
Ind. Dep't of Environmental Mgt. v. Bourbon Mini Mart, Inc.	741 N.E.2d 361 No. 50A03-9912-CV-476	(1) third-party plaintiffs were collaterally estopped from pursuing indemnity claim against automobile dealership; (2) third-party plaintiffs were collaterally estopped from pursuing indemnity claim against gasoline supplier pursuant to pre-amended version of state Underground Storage Tank (UST) laws; (3) amendment to state UST laws, which eliminated requirement that party seeking contribution toward remediation be faultless in causing leak, did not apply retroactively so as to allow contribution for response costs that were incurred before its effective date; and (4) third-party plaintiffs' action against gasoline supplier to recover ongoing remediation costs was not time barred.	6-14-01	
In re Ordinance No. X-03-96	744 N.E.2d 996 02A05-0002-CV-77	Annexation fiscal plan must have noncapital services estimates from a year after annexation and capital improvement estimates from three years after annexation.	7-18-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Corr v. Schultz	743 N.E.2d 1194 71A03-0006-CV-216	Construes uninsured motorist statutes to require comparison of what negligent party's insurer actually pays out with amount of insured's uninsured coverage; rejects prior Court of Appeals decision, *Sanders*, 644 N.E.2d 884, that uninsured statutes use comparison of negligent party's liability limits to uninsured coverage limit ("policy limits to policy limits" comparison); notes that not-for-publication decision from same accident, *Corr v. American Family Insurance*, used *Sanders* to hold that the correct analysis was to "compare the $600,000 per accident bodily injury liability limit under the two policies covering Balderas [negligent driver] to the $600,000 per accident underinsured motor vehicle limit of the policies under which Janel [Corr] was an insured; transfer also granted 7-18-01 in this unreported *Corr* case.	7-18-01	
Friedline v. Shelby Insurance Co.	739 N.E.2d 178 71A03-0004-CV-132	Applies Indiana Supreme Court cases finding ambiguity in liability policies' exclusions for "sudden and accidental" and "pollutant" as applied to gasoline to hold that "pollutants" exclusion as applied to carpet installation substances was ambiguous and that insurance company's refusal to defend, made with knowledge of these Supreme Court ambiguity decisions, was in bad faith.	7-18-01	
St. Vincent Hospital v. Steele	742 N.E.2d 1029 34A02-0005-CV-294	IC 22-2-5-2 Wage Payment Statute requires not only payment of wages at the usual frequency (e.g., each week, etc.) but also in the correct amount, so Hospital which relied on federal legislation and federal regulatory interpretation for its refusal to pay physician contract compensation amount was liable for attorney fees and liquidated damages under Statute.	7-18-01	
Smith v. State	748 N.E.2d 895 29A02-00100PC-640	Error to find PCR laches when petition was filed within 27 days of sentencing and all ensuing delays due to Public Defender; guilty plea to six theft counts, for stealing a single checkbook containing the six checks, was unintelligent due to counsel's failure to advise of "single larceny" rule; the theft of the checkbook and ensuing deposits of six forged checks at six different branches of the same bank in the same county "within a matter of hours" were a "single episode of criminal conduct" subject to limits on consecutive sentencing and counsel's failure to discuss the single episode limit also rendered plea unintelligent.	7-19-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Martin v. State	748 N.E.2d 428 03A01-0012-PC-412	Holds that no credit for time served is earned by one on probation as a condition of probation, distinguishing *Dishroon v. State* noting 2001 amendment providing for such credit is inapplicable.	8-10-01	
State Bd. of Tax Comm'rs v. Garcia	743 N.E.2d 817 (Tax Ct. 2001) 71T10-9809-TA-104	Calculation by which Grade A-6 assessment was reached was not supported by regulations and hence was arbitrary and capricious. Swimming pool assessment as "A" rather than "G" was likewise outside regulations and reversed.	8-13-01	
Dunson v. Dunson	744 N.E.2d 960 (Ind. Ct. App. 2001) 34A02-0006-CV-375	Construes emancipation statute to require only that child not be under the care or control of either parent without any requirement he also be able to support himself without parental assistance.	8-13-01	
D'Paffo v. State	749 N.E.2d 1235 (Ind. Ct. App. 2001) 28A004-0010-CR-442	Child molesting instruction's omission of element of intent to gratify sexual desires when touching was fundamental error, not waived by failure of appellant to object, notwithstanding defense that victim was never touched at all. When witnesses had been cross-examined and given chances to explain prior inconsistent statements, the statements themselves were properly excluded as impeachment, Evidence Rule 613.	8-24-01	
Farley Neighborhood Association v. Town of Speedway	747 N.E.2d 1132 49S02-0101-CR-43	Continuation of 45-year-old 50% surcharge on sewage service to customers outside municipality was arbitrary, irrational, and discriminatory..	9-20-01	
Neher v. Hobbs	752 N.E.2d 48 92A04-0008-CV-316	Trial judge erred in requiring new trial when jury found defendant negligent but awarded $ 0 damages, as jury clearly found injury was preexisting.	9-6-01	
Hall Drive Ins, Hall's Guesthouse v. City of Fort Wayne	747 N.E.2d 638 02A04-0005-CV-219	Restaurant was subject to exception to City's anti-smoking ordinance.	9-20-01	
Hall Drive Ins, Triangle Park v. City of Fort Wayne	747 N.E.2d 643 02A03-0005-CV-189	Companion case to *Hall Drive Ins, Hall's Guesthouse v. City of Fort Wayne*, above	9-20-01	
Ind. Dep't of Revenue v. Deaton	738 N.E.2d 695 73A01-0002-CV-49	State income tax warrant's filing with county clerk does not create a judgment for proceedings supplemental.	9-26-01	9-26-01. 755 N.E.2d 568. Tax judgment lien may be collected through proceedings supplemental without first filing suit and obtaining a judgment of foreclosure.
Hinojosa v. State	752 N.E.2d 107 45A05-0010-CR-450	Third party may obtain grand jury transcipts based on statutory "particularized need," as here with police officer "whistleblower."	11-15-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Bowers v. Kushnic	743 N.E.2d 787 45A04-0004-CV-168	Under rule that, if the insured has done everything within her power to effect the change of beneficiary, substantial compliance with policy requirements can be sufficient to change the beneficiary, facts were not sufficient to show intent to change.	11-15-01	
Family and Social Services Admin. v. Schluttenhofer	750 N.E.2d 429 No. 91A02-0010-CV-638	Payment for medical expenses from injured's employer's policy was subject to IC 34-51-2-19 proportionality reduction of Medicaid lien.	11-15-01	
Poananski v. Hovath .	749 N.E.2d 1283 No. 71A03-0101-CV-34	For summary judgment, the very fact that a dog bit a human without provocation is evidence from which a reasonable inference can be made that the dog had vicious tendencies, and it may be further inferred that if the dog had vicious tendencies based on this one incident, then a question of fact exists as to whether the dog owner knew or should have known of these tendencies	11-15-01	
Stegemoller v. AcandS, Inc.	749 N.E.2d 1216 No. 49A02-0006-CV-390	Wife of insulator who worked with asbestos did not qualify as a "bystander" who was reasonably expected to be in the vicinity of the product "during its reasonably expected use," and thus, she could not recover under Indiana Product Liability Act (IPLA).	11-15-01	
Ringham v. State	753 N.E.2d 29 No. 49A02-0009-CR-577	Reversible error not to have complied with Marion Superior statute which required an elected judge return to handle trial when prompt objection was made to master commissioner's presiding.	12-13-01	
Ratliff v. State	753 N.E.2d 38 No. 49A02-0010-CR-677	At scene of fleeing suspect's auto crash, police could have searched vehicle under either lawful arrest or "fleeting evidence" auto exceptions to warrant requirement, but after vehicle had been taken to police station to be searched neither exception continued to apply and warrant or lawful inventory search was required.	12-20-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Sholes v. Sholes	732 N.E.2d 1252 No. 27A02-9906-CV-445	IC 34-10-1-2 confers an absolute right upon any indigent civil litigant to counsel at government expense.	12-21-01	No. 27S02-0112-CV-655, 12-21-01. (1) Appointment of counsel under IC 34-10-1-2 for an indigent civil litigant is mandatory; (2) counsel must be compensated; (3) trial courts have power under Trial Rule 60.5 to order payment of appointed counsel, but (4) the same considerations governing other court-mandated funding apply in determining whether mandate is appropriate, and (5) counsel for whom mandate of compensation is not appropriate under T.R. 60.5 cannot constitutionally be appointed under the statute.
R.L. McCoy, Inc. v. Jack	752 N.E.2d 67 No. 49A02-0011-CV-749	When settlement agreement required negligence plaintiff to repay any excess to settling defendant (who would be nonparty at trial) if 1) the settlement payment amount exceeded the nonparty verdict; and 2) the excess would have operated as a set-off to another of the defendants *if the agreement were not a loan,* defendant was entitled to be repaid amount settlement exceeded its nonparty liability at trial.	12-27-01	
Ray-Hayes v. Heinamann	743 N.E.2d 777 No. 89A05-0007-CV-306	For purposes of statute of limitations, action was commenced when complaint was filed, even though copies of summons were not filed with clerk until after statute would have run.	1-2-02	No. 89S05-0201-CV-306 . 1-02-02. Not just complaint but also copies of summons and filing fee are required to be filed and paid in order for action to "commence" for purposes of statutes of limitations.